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Abstract

Kangaroo Courts represents the height of the recent work that Desmond Manderson has developed around the nexus between 'law and literature' and the rule of law. Manderson's approach to this matter is unique in taking seriously both literary theory and the aesthetic aspects of literary texts—strange though it may seem, this is an authentic revolution in the field of law and literature. Manderson rightly observes that back to their very origins the discourses constructed around the conjunction of 'law and literature' have suffered from two structural weaknesses: first 'a concentration on substance and plot' and second 'a salvific belief in the capacity of literature to cure law or perfect its justice' (Manderson 2012a, 9). The first fails to question the 'mimetic fallacy' that regards the imitation of nature or reality as the main function of art (Manderson 2011, 108-118; 2012a, 10-17). The second fails to question the 'romantic fantasy' that sets the purpose of art in 'healing the world's wounds' (Manderson 2011, 118-121; 2012a, 17-20).

Keywords

legacy, law, rule, courts, kangaroo, manderson, desmond, review, book, 2012, abingdon, routledge, modernism

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Book Review

Desmond Manderson: *Kangaroo Courts and the Rule of Law. The Legacy of Modernism.* Routledge, Abingdon 2012.

Luis Gómez Romero*

Kangaroo Courts represents the height of the recent work that Desmond Manderson has developed around the nexus between ‘law and literature’ and the rule of law.¹ Manderson’s approach to this matter is unique in taking seriously both literary theory and the aesthetic aspects of literary texts—strange though it may seem, this is an authentic *revolution* in the field of law and literature. Manderson rightly observes that back to their very origins the discourses constructed around the conjunction of ‘law and literature’ have suffered from two structural weaknesses: first ‘a concentration on substance and plot’ and second ‘a salvific belief in the capacity of literature to cure law or perfect its justice’ (Manderson 2012a, 9). The first fails to question the ‘mimetic fallacy’ that regards the imitation of nature or reality as the main function of art (Manderson 2011, 108-118; 2012a, 10-17).² The second fails to question the ‘romantic fantasy’ that sets the purpose of art in ‘healing the world’s wounds’ (Manderson 2011, 118-121; 2012a, 17-20).³

Manderson contends that what makes literature worth reading is neither its coherence with the world, nor the morality it endorses. The aesthetic ideals of modernism, which so dramatically transformed the landscape of literature, philosophy and politics around the turn of the 20th century, reject precisely these claims. Modernist texts are noteworthy because of their quest for aesthetic autonomy through ‘the eternal recurrence of play and form and the priority of voice over event’ (Manderson 2012a, 16). From a modernist perspective, thus, reading a novel as a

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1 See Manderson 2011, 2012, 2012b and 2012c.

2 See, for example West 1985 and 1986, Posner 1986, Nussbaum 1995 and Lacey 2008.

3 See, for example Nussbaum 1995, Ward 2003 and Williams 2005.

‘normative framework to convey information concerning “the real world”’ miserably forsakes to appreciate ‘the dimensions of form and style in works of literature as central elements of our experience and enjoyment of them’ (Manderson 2011, 116–117). Modernism simply has not happened yet in the academic field that we call ‘law and literature’—that is, the study of literature by scholars who are mainly interested in law—as it clings to a time ‘before the crisis of modernity’ that shook both law’s and literature’s claims to ‘the certainty and objectivity of the written text’ (Manderson 2012a, 20). In this regard, it must be noted that while *modernism* and *modernity* are related, they should also be sharply distinguished. In Manderson’s words:

Modernity might be said to encompass the monumental changes in society and in belief that the Enlightenment set in motion and that accelerated and ramified with the industrial revolution right through the nineteenth century. Modernism [...] refers to the paroxysms which ensued when the worlds of the arts and ideas began to depict, understand, and respond to them. Some would date modernism as early as the publication of Rimbaud’s *Un Saison en Enfer* in 1873, with its ruthless rejection of romance and its ringing final sentence: ‘One must be absolutely modern.’ Well before the First World War [...] Sigmund Freud and Henri Bergson, Cézanne, Malevich, Kandinsky and the Blue Rider School, Stravinsky’s *Firebird Suite* and *Rite of Spring* and Schoenberg’s *Second String Quartet* had all broken with key tenets of aesthetic and social convention. (Manderson 2012a, 26.)

The ascension of modernism overlaps with the ‘crisis of modernity’—Manderson regularly uses the noun ‘crisis’ in its singular form—that was triggered by World War I, which in turn virtually destroyed the trust in the systems, beliefs and institutions whereon the so-called Western *civilization* was erected: reason, science, industrialization, capitalism and liberal democracy. To put it briefly, modernism is a response to the ‘crisis of modernity’. Modernism signifies ‘a commitment to individual over social good, a sense of rootlessness and exile, and, coupled with an emphasis on the varieties and uncertainties of individual subjectivity, the most comprehensive critiques of representation and the most radical experiments in form’ (Manderson 2012a, 27).

In each of the arts, stylistic variation and reinterpretation—even parody or pastiche—of the past canon were central to the modernist period. In the literary field, modernism entails therefore an understanding of literature ‘as a site of questions not of answers, of the creation of textual doubt and ambiguity not certainty’ (Manderson 2011, 108). Modernism destabilized the syntactic and logical articulations which had previously communicated a story to the reader by focusing instead in fragmentation, indeterminacy and singularity both in voice and perspective (Manderson 2012a, 19).⁴ Irony is thus central to our understanding of literary modernism as it juxtaposes ‘the

4 This is the case, just to mention a couple of examples, of James Joyce’s *Ulysses* (1922), whose encyclopaedic intertextuality displays multiple levels of conceptual and formal structures; or Virginia Woolf’s *Mrs. Dalloway* (1927), which follows the stream of consciousness of its central characters through twenty-four hours.

play of levels and registers within a text, and the tensions between levels of meaning which thereby undermine the most innocent of speech acts' (Manderson 2011, 121; 2012a, 17).

Nonetheless, the emergence of new artistic styles that stressed the importance of subjective experience was not the only effect of the horrors that emerged from the Great War's trenches. Romanticism regained momentum. Even though liberals have consistently identified romanticism either with reactionary or plainly totalitarian politics (Talmon 1960; Berlin 1999), Manderson appropriately avoids this misleading account of its political, philosophical and aesthetic ramifications. Based on the seminal work of M. H. Abrams on romanticism, Manderson identifies as its central philosophical feature 'a metaphysics of integration, of which the key principle is that of the "reconciliation" or synthesis of whatever is divided, opposed, and conflicting' (Manderson 2012a, 17; Abrams 1971, 177-183). The romantic sensibility is bound up with the painful conviction that in modern capitalist reality something precious has been lost, at the level of both individuals and humanity at large. Romanticism resists therefore the alienation of certain essential human values—*qualitative* values as opposed to the purely *quantitative* exchange value that predominates in capitalist modernity—and promises instead the overcoming of difference, the accomplishment of inward plenitude and the instauration of harmony among human beings.

Manderson diagnoses a growing dilemma between introspection, individual self-assertion, and the claims of the collective among Western intellectuals as modernism moved *in crescendo* into the political tensions of the 1920s. In the years that followed World War I 'many writers, artists and thinkers were virulently opposed to the legal and social history of positivism and rejected in almost identical terms its obsession with mechanics, systems, technology and rules' (Manderson 2012a, 40). In the writings of the German New Romantics—Eugen Diederichs, Paul de Lagarde and Julius Langbehn, among other authors—'we can observe the same fusion of nature, tradition, custom, religion; the same belief in justice as hierarchical and leadership as manifest' (Manderson 2012a, 41). I think George Orwell effectively illustrates Manderson's claim when he plunges into the belly of modernism and describes the experience of transiting from radical aesthetic individualism to the desire of collective harmony and transcendence in the following terms: 'Suddenly we have got out of the twilight of the gods into a sort of Boy Scout atmosphere of bare knees and community singing.' (Orwell 1968, 510).

Orwell sharply describes in this way the cultural mood that fostered the *reactionary* constituent of modernism, which Manderson defines as 'romanticism which has taken a political and nihilistic turn' (Manderson 2012, 15). No author better shows the implications for the rule of law of this resurgent romantic spirit than Carl Schmitt, whose work virtually dissolves law into the mutually enticing forces of politics and emotions. Manderson acknowledges that the association of Schmitt with romanticism is not obvious: his *Political Romanticism* is precisely 'a vitriolic diatribe *against* political romanticism' (Manderson 2012a, 42; Schmitt 2011). Nonetheless, Schmitt clearly fits into a pattern of anti-modernist legality that

reinstates transcendent decision as the key element of the legal system. Manderson contends that '[i]f he dismissed political romanticism as "the sovereignty of the ego", his solution merely substituted the egotism of the sovereign' by transferring it to an original and charismatic authority that is 'underived from any institutional structure' (Manderson 2012a, 43; Schmitt 2011, 65).

Schmitt's critique of legal positivism was forged out of the ashes of the Great War. 1922 marks a critical turn in his thought. The publication that year of *Politische Theologie* exhibited his decisive rejection of the liberal rule of law as expressed through positivist legal theory. Contrarily to the basic idea of the rule of law, which is expressed in the phrase 'government by law and not by men'—that is, that the government shall be ruled by the law and subject to it, making it possible for individuals to foresee with fair certainty how the authority will use its coercive powers, and to plan their affairs on the basis of this knowledge (Raz 1977, 195-198)—, Schmitt had come to believe that justice could not be achieved even by the best of rules. Schmitt's key theses can be encapsulated in the following threefold principle: i) 'Sovereign is he who decides the exception'; ii) '[t]he exception is that which cannot be subsumed [... it] appears in its absolute form when a situation in which legal prescriptions can be valid must first be brought about', and iii) '[t]he exception in jurisprudence is analogous to the miracle in theology'. (Schmitt 1985, 5, 13 and 36). For Schmitt, justice was not found in legal structures but in their exceptions; not by reference to established procedures but by summoning the voice of the people and the force of the leader who would condense and amplify it.

The exasperation that Schmitt and the New Romantics expressed about the logical and moral limits of positivism resonates today in us as forcefully as it did in 1922. The attack on the Twin Towers and their collapse on 11 September 2001 gave birth to the *brave new world* of Guantanamo Bay and Abu Ghraib. Both listlessness in regulating economic powers and corruption have spread all over the world dystopian realities in the form of a devastating economic crisis.⁵ Law seems helpless to constrain public powers that have resuscitated a Hobbesian conception of untrammelled sovereignty as well as private powers that do not accept any legal limits in their quest for profit.

The traditional positivist conceptions of language, objectivity and meaning in law seem highly inefficient to address these challenges. The rule of law is lethally imperilled, but we still do not have anything replace it. Manderson asserts that D. H. Lawrence's work constitutes a timely platform for reassessing our problems with justice and judgment because no less than him 'we still face the terrible problem of what to do once we can no longer believe in our old habits of thought: for belief has died though the habit of believing lingers on' (Manderson 2012a, 3). *Kangaroo*—a novel Lawrence wrote in the sea side town of Thirroul on south coast of Sydney where he and his wife Frieda stayed for six weeks during the Australian winter of 1922—responds precisely to the disorientation caused by the Great War and its implications

⁵ For a recent account on the present worldwide dystopian realities, see World Economic Forum 2012 (specifically, the section titled 'Seeds of Dystopia', 16-19).

for art, politics and law. *Kangaroo* faithfully depicts the *allure* of totalizing ideologies that promise the redemption of justice and community under the authority of a wise and loving leader—*Duce*, *Führer*, or *Caudillo*—, but ultimately Lawrence recoils from them and renounces his own fondness for authoritarian politics. Lawrence actually changed his mind about the need of leadership for achieving justice. In a much quoted letter written to Witter Bynner—dated 13 March 1928—Lawrence categorically asserted:

The hero is obsolete, and the leader of men is a back number. After all, at the back of the hero is the militant ideal: and the militant ideal, or the ideal militant seems to me also a cold egg. We're sort of sick of all forms of militarism and militantism [...] the leader-cum-follower relationship is a bore. And the new relationship will be some sort of tenderness, sensitive, between men and men and men and women, and not the one up one down, lead on I follow, *ich dien* sort of business. (Lawrence 1991, 321.)

Manderson's reading of Lawrence's *Kangaroo* as a dialogic and polyvalent text provides us with a basis to state that this letter does not inaugurate a new stage in Lawrence's thought but rather continues an earlier one whose origins can be traced up to his brief sojourn in Australia.⁶ *Kangaroo* tells the story of Richard Lovatt Somers—Lawrence's *alter ego*—, an English writer whom a group of war veterans who call themselves 'Diggers' tries to recruit to the cause of a right-wing takeover in Australia. The righteous authority of their leader, a lawyer born Benjamin Cooley and known as 'Kangaroo', is their only political creed:

I want to keep *order*. I want to remove physical misery as far as possible [...] And that you can only do by exerting strong, just *power* from above [...] I should try to establish my state of Australia as a kind of Church, with the profound reverence for life [...] as the motive power [...] Yet there must be law, and there must be authority. But law more human, and authority much wiser [...] Man needs a quiet, gentle father who uses his authority in the name of living life, and who is absolutely stern against anti-life. I offer no creed. I offer myself, my heart of wisdom, strange warm cavern where the voice of the oracle steams in from the unknown; I offer my consciousness, which hears the voice; and I offer my mind and my will, for the battle against every obstacle to respond to the voice of life, and to shelter mankind from the madness and the evil of anti-life. (Lawrence 1923, 126-127.)

Kangaroo's pretended legitimacy comes from 'the ability of a true leader to act wisely outside of the rules, to realize that the unity of the people transcends vested interests, and to receive the allegiance of his subjects [...] by virtue of his natural

6 Philip Sicker argues that Lawrence's retreating from leadership politics lasted only until 1929, at which time his Grand Inquisitor essay reasserted the importance of the hero (Sicker 1992). However, as Jad Smith observes, the question of whether or not Lawrence eventually reaffirmed his interest in leadership politics matters less than his hesitation while he was writing the 'leadership novels' (Smith 2002, 21).

and manifest authority' (Manderson 2012a, 58). Somers initially succumbs to the seduction of these ideals of cohesive community and charismatic leadership as Kangaroo directly appeals to his contempt for egalitarianism and *corrupt* modernity. He regards Australia as a loathsome '*terre democratic*' without any sense of 'class distinction', where '[t]he proletariat appoints men to administer the law, not to rule' (Lawrence 1923, 18). Somers craves instead '[t]he mystery of lordship [...] the mystic recognition of difference and innate priority, the joy of obedience and the sacred responsibility of authority' that 'democracy and equality try to deny and obliterate' (Lawrence 1923, 121).

Manderson suggests that to understand *Kangaroo's* argument properly we must pay attention not just to Somers, but to *all* its characters and to the different voices that struggle in each character's conscience (Manderson 2012a, 125). Somers' voice in the novel is constantly undermined and destabilized by others voices: by the narrator, by his wife Harriet and even by Somers himself through an internal dialogue between the yearning to lose himself into collective unity and the desire for solitude. Somers repeatedly berates himself as he acknowledges he is merely a 'preacher and a blatherer', a plain fool and even a 'beastly' and 'detestable little brat' (Lawrence 1923, 319, 327-328 and 332).

Indeed, Harriett's is the most powerful voice that subverts Somers' pretensions. Manderson calls our attention to a particular example which illustrates how Lawrence ironically modulates his own voice, citing his own opinions in contexts that subtly disrupt them (Manderson 2012a, 125-126). On a cold day at the beach—Lawrence tells us—Somers' hat is caught by the wind and carried into the waves. He clumsily manages to rescue it (Lawrence 1923, 322). Chilled and wet, he continues to lecture Harriet on the way home about the convenience of reawakening 'the aristocratic principle' that advocates the recognition of 'the *innate* difference between people'. Harriet retorts brutally: 'Aristocratic principle! [...] You should have seen yourself, flying like a feather into the sea after your hat.' (Lawrence 1923, 325). Later, he sits in a little barrel with a rusty tin-lid to warm himself near the fire. She pours scorn on him again: 'Old tin lids! How can you *sit* on it? [...] Is that your aristocratic principle?'. (Lawrence 1923, 326).

The novel's embodiment in multiple characters provides resistance to the claims and arguments of each of them. Somers' engagement in active dialogue with other characters' voices transmutes his viewpoints about politics and justice. As Somers gradually abdicates the hierarchical and collectivist creed he endorsed at the time he arrived to Australia, he ruminates that '[l]ife makes no absolute statement [...because] Life is so wonderful and complex, and *always* relative.' (Lawrence 1923, 314). In the end, he refuses to be seduced by the promises of any man to truly possess the insight and authority that Kangaroo vindicates. Somers just wants to be left 'alone by himself, alone with his own soul, alone with his eyes on the darkness which is the dark god of life.' (Lawrence 1923, 330). Thus, he finally declines Kangaroo's suffocating embrace:

Don't love me. Don't want to save mankind. You're so awfully *general*, and your love is so awfully general [...] Let's be hard, separate men [...] you're such a Kangaroo, wanting to carry mankind in your belly-pouch, cozy, with its head and long ears peeping out. You sort of figure yourself a Kangaroo of Judah, instead of a Lion of Judah [...] Let's get off it, and be men, with the gods beyond us. I *don't* want to be godlike, Kangaroo. I like to know the gods beyond me. Let's start as men, with the great gods beyond us. (Lawrence 1923, 245.)

Why did Lawrence turn his back on reactionary romanticism in this way? Manderson thinks that the answer lies in the novel itself. Mikhail Bakhtin's writings on the novel provide us with the necessary elements to understand Lawrence's ideological evolution through *Kangaroo*. Bakhtin highlights the novel as an inherently fragmentary and double-voiced genre. The most powerful feature which Bakhtin recognizes in the novel is its *heteroglossia* or polyphony, its characteristic multiplication of voices and perspectives. In speech, 'every word is directed toward an answer and cannot escape the profound influence of the answering word that it anticipates.' (Bakhtin 1981, 280). The novel reproduces this aesthetical—as well as ethical—quality of speech.

Bakhtin defines the novel as 'a diversity of social speech types (sometimes even diversity of languages) and a diversity of individual voices, artistically organized'. (Bakhtin 1981, 262). Its distinctive 'dialogic imagination' gives a particular voice to each of the characters and sets these voices *against* one another. The novel's multiple voices appear in many different mutual relations—of stylization, parody, hidden polemic, and so on. Along these lines, the novel points not just to a mosaic of voices, but at the same time to their transformation under the communicative pressure of their contexts of utterance. This is what Bakhtin means when he speaks about the novel as a literary genre that is basically 'dialogized, permeated with laughter, irony, humor' and 'elements of self-parody', and also imbued with 'indeterminacy, a certain semantic open-endedness' and 'a living contact with unfinished, still-evolving and contemporary reality' (Bakhtin 1981, 7).

If we read *Kangaroo* from a Bakhtinian perspective, we will most probably conclude—as Manderson does—that Lawrence did not write *Kangaroo*, but *Kangaroo* rewrote Lawrence (Manderson 2012a, 90-111). Bakhtin's claims are both echoed in D.H. Lawrence's own essays on the novel, and performed in his 'leadership novels' (Manderson 2012a, 142-144, 152; Hyde & Clark 1993-1994, 140-141). In his 'Study of Thomas Hardy', Lawrence contends that an authentic work of art 'must contain the essential criticism of the morality to which it adheres' in order to create 'the conflict necessary to every tragic conception' (Lawrence 1985, 89). *Kangaroo* similarly refers to the 'laws of polarity', which are described as the movement between two flows, one sympathetic and loving, the other mighty and authoritarian. Lawrence writes that '[i]n the absolute triumph of either flow lies the immediate surety of [human] collapse'. (Lawrence 1923, 354-355).

The Great War brought on the crisis which stimulated Lawrence to work through the tensions between opposing principles that he refused to cap by a fruitless appeal to some ideal state of concord. *Kangaroo* embodies 'an earnest if

perverse commitment: *not* to resolve its contradictions and tensions but to see in them its main character's essential activity' (Manderson 2012c, 492). Polarity is neither synthesis nor harmony, but plain opposition between 'forces that cannot be compromised since we are committed too much to *both*' (Manderson 2012c, 493). Polarity underscores the fragility, provisionality and temporariness of *every* textual medium—including law—and expresses an unremitting willingness to revise, rethink and renew our social conditioning, historical contextualization, and epistemic and discursive formations (Eggert 1999).

In sum, Lawrence believed (and Manderson agrees) that we should not try to eliminate or conciliate contradictory beliefs, arguments or expectations, but rather draw our strength from them. 'A man's soul is a perpetual call and answer', he writes. (Lawrence 1923, 314). Polarity is precisely the main tenet of the post-positivist conception of the rule of law that Manderson names, after *Kangaroo*, 'Thirroul of Law'. *Call and answer*: the rule of law consists in a public debate of (legal) reasons that acknowledges the unfeasibility of interpretative closure in face of the plurality and singularity of circumstances that characterize legal work. Manderson argues that the literary modernism of Bakhtin and Lawrence entails a crucial public dimension through which the pressure of conveying and justifying our judgments to others transforms our understanding of the rule of law into 'a set of ideas that institutionally protect the social and dialogic process of exposing and critiquing reasons for decision, rather than as a set of ideas that institutionally entrench the hierarchical or hieratical process of announcing them' (Manderson 2012a, 159).

According to Manderson, Derrida makes a similar point when he addresses the unavoidable aporias that burden legal judgment: 'for a decision to be just and responsible, it must [...] be regulated and without regulation: it must conserve the law and also destroy or suspend it enough to have to reinvent it in each case, rejustify it, at least reinvent it in the reaffirmation and the new and free confirmation of its principle'. (Manderson 2012a, 166; Derrida 1990, 961). In other words, legal judgment is permanently torn between two contradictory directions: on the one hand, the abstract rule; on the other hand, the uniqueness of the particular case that cannot be settled in advance. Legal judgment cannot choose 'between justice (infinite, incalculable, rebellious to rule and foreign to symmetry) and the exercise of justice as law or right, [...] calculable, a system of regulated and coded prescriptions' (Derrida 1990, 959). The endless cycle of tensions, oppositions and disagreements between prior rules and new circumstances render legal decision basically unstable and imperfect.

Manderson's approach to law and literature is deeply bound up in our present imperfection, our fragmentation and the imperfection and fragmentation of justice with us. Manderson opposes the configuration of 'Thirroul of Law' both against positivists' assertion of law's perfection and the romantics' of its perfectibility—the former 'a claim of purity centered on the past' and the second 'a dream of it focused on the future' (Manderson 2012a, 178). The reconfiguration of the positivist rule of law into the post-positivist 'Thirroul of Law' has therefore, at least, three salient

features. First, ‘the rule of law is not the outcome of a foundation, but a process of continually putting them [foundations] in question.’ Secondly, ‘the rule of law is governed by reasons rather than a singular or categorical reason.’ Thirdly, ‘the rule of law does not present commandments that are handed down *to* us, but a discourse by which the law learns *from* us, paying attention to new circumstances and individual lives.’ (Manderson 2012a, 179-180).

This way, ‘Thirroul of Law’ moves beyond romantic transcendence by accepting that we have not lost the foundations of law, but have always *lacked* them (Manderson 2012a, 150-152). Manderson concludes that ‘Thirroul of Law’ does not advance certainty, but actually enshrines uncertainty by acknowledging ‘trial and error’ as the legal method *par excellence*, and argument and doubt as a mark of success. (Manderson 2012, 23; 2012c, 504).

Manderson’s *Kangaroo Courts* must be read not only as a keystone for an authentic renaissance of the field of law and literature, but also as a groundbreaking contribution to contemporary jurisprudence that interrogates and challenges the very language in which we are used to think about law. It seems to me, however, that Manderson’s judgment of legal positivism is a bit too harsh. A more nuanced vision of both positivism’s emancipatory horizons and discursive limits results by introducing a slight hue in Manderson’s theses on the legal legacy of modernism: modernity is not unique, and its crises are plural. In this non-Eurocentric sense, *modernities* entail several competing master narratives and cultural contextualizations that result in multiple legal crises. Thus, positivism can still represent an adequate response to the problem of justice depending on the circumstances of particular contexts that are determined altogether through social institutions and systems, social agents, and cultural and symbolic forms. Let us remember, for example, that positivism played a major role in undermining the legal and jurisprudential discourses that structured the dictatorship of Francisco Franco in Spain (Díaz 1975) or the *Junta* regime in Argentina (Alchuorrón and Bulygin 1975). By considering a single crisis of modernity, Manderson narrowed the scope of his call to rethink the rule of law to the singularity of the Australian postcolonial modernity where the positivist rule of law and the liberal public sphere were, since the time in which Lawrence wrote *Kangaroo*, ongoing—though imperfect—realities.

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